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In the Supreme Court of the United States

CONTINENTAL CARBON CO. AND
CHINA SYNTHETIC RUBBER CORP.,
Petitioners,

v.

ACTION MARINE, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN CHEMISTRY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF THE *AMICI CURIAE* 1

STATEMENT 2

INTRODUCTION AND SUMMARY OF ARGUMENT 6

ARGUMENT 10

I. The Eleventh Circuit's Decision Conflicts With This Court's Decisions Concerning The Meaning Of The Third *BMW* Factor 11

II. The Eleventh Circuit's Decision Exacerbates Conflicts And Confusion In The Lower Courts Over The Proper Interpretation Of The Third *BMW* Factor 17

CONCLUSION 20

TABLE OF AUTHORITIES

Page(s)

Cases:

BMW of N. Am., Inc. v. *Gore*,
517 U.S. 559 (1996) ..... *passim*

Bouie v. *City of Columbia*, 378 U.S. 347 (1964) 6

Bowers v. *Hardwick*, 478 U.S. 186 (1986) 13

Clark v. *Chrysler Corp.*,
436 F.3d 594 (6th Cir. 2006) 18

Cooper Indus., Inc. v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) 8, 12, 17, 18

In re Exxon Valdez, 490 F.3d 1066 (9th Cir. 2007), pet. for cert. filed, 76 U.S.L.W. 3073 (U.S. Aug. 20, 2007) (No. 07-219) 19

Johansen v. *Combustion Eng'g, Inc.*,
170 F.3d 1320 (11th Cir.), cert. denied,
528 U.S. 931 (1999) 3, 4

Lankford v. *Idaho*, 500 U.S. 110 (1991) 13

Leatherman Tool Group, Inc. v. *Cooper Indus., Inc.*, 285 F.3d 1146 (9th Cir. 2002) 12

Mathias v. *Accor Econ. Lodging, Inc.*,
347 F.3d 672 (7th Cir. 2003) 18

TABLE OF AUTHORITIES – Cont'd

Page(s)

Pac. Mut. Life Ins. Co. v. *Haslip*,
499 U.S. 1 (1991) 10

State Farm Mut. Auto. Ins. Co. v. *Campbell*,
538 U.S. 408 (2003) ..... *passim*

Union Pac. R.R. v. *Barber*, 149 S.W. 3d 325 (Ark.),
cert. denied, 543 U.S. 940 (2004) 18

Willow Inn, Inc. v. *Pub. Serv. Mut. Ins. Co.*,
399 F.3d 224 (2005) 18, 19

Statutes:

Alabama Code § 22-22A-4 3

Alabama Code § 22-22A-5 ..... 3, 14

Alabama Code § 22-22A-5(18)a 3

Alabama Code § 22-22A-5(18)c ..... *passim*

Miscellaneous:

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ENVIRONMENTAL SUMMARY 2000 ... 16

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ENVIRONMENTAL SUMMARY 2001 ... 15

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ENVIRONMENTAL SUMMARY 2002 ... 16

TABLE OF AUTHORITIES – Cont'd

Page(s)

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ENVIRONMENTAL SUMMARY 2003 . . . 16

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ENVIRONMENTAL SUMMARY 2004 . . . 16

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ENVIRONMENTAL SUMMARY 2005 . . . 16

ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ENVIRONMENTAL SUMMARY 2006 . . . 16

Steven Chanenson & John Yotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze From the* BMW/State Farm *Guideposts*, 37 U. MICH. J.L. REFORM 441 (2004) 19, 20

Jenny Jiang, Comment, *Whimsical Punishment: The Vice of Federal Intervention, Constitutionalization, and Substantive Due Process in Punitive Damages Law*, 94 CAL. L. REV. 793 (2006) 19

Andrew Moskowitz, Comment, *Meaning Is In The Eye of The Beholder:* BMW *v.* Gore *and its Potential Impact on Toxic Tort Actions Brought Under State Common Law*, 8 FORDHAM ENVT'L L.J. 221 (1996) . . 20

BRIEF OF THE AMERICAN CHEMISTRY COUNCIL AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*[1]

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry, a $635 billion enterprise that accounts for ten cents of every dollar in exports and is a critical component of the nation's economy. ACC members apply the science of chemistry to create and manufacture innovative products and services that make the lives of people throughout the country and abroad better, safer, and healthier.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment that is conducive to economic growth. NAM also seeks to increase understanding among policymakers, the media, and the public about the vital role of manufacturing to America's economic future and living standards.

In support of these objectives, ACC and NAM regularly file briefs as *amici curiae* in this Court and in other courts in cases that are significant to their respective members. This is such a case. Because ACC and NAM members are often the subject of suits seeking punitive damages, they have a substantial interest in the development of sound legal principles governing the power of juries to mete out punishment in civil litigation.

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[1] The parties' letters of consent to the filing of this brief have been lodged with the Clerk. Pursuant to S. Ct. Rule 37.6, *amici* state that no counsel for a party has written this brief in whole or in part and that no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

STATEMENT

In *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996), this Court explained that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." To ensure such fair notice, and ultimately to determine whether "a more modest punishment * * * could have satisfied the State's legitimate objectives" of punishment and deterrence (*State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 419-20 (2003)), this Court has instructed reviewing courts to examine three guideposts in evaluating whether a punitive damages award is constitutionally excessive. This case provides a valuable opportunity to clarify all three guideposts, including the oft-misunderstood "comparable penalties" guidepost, and to bring the Eleventh Circuit into line with the decisions of this Court and other federal and state appellate courts.

1. This is an environmental case involving discoloration and damage to property (but no claim of physical illness or injury) flowing from the release of "carbon black," a compound with many useful commercial applications, from a manufacturing plant in Phenix City, Alabama. The plant is owned by petitioner Continental Carbon Co. ("CCC"), which is an indirect subsidiary of petitioner China Synthetic Rubber Corporation. Respondents are the City of Columbus, Georgia; city resident Owen Ditchfield; a boat dealership, Action Marine, Inc.; and the dealership's owner, John Tharpe. The jury returned a verdict for respondents, awarding $570,000 to the City for remediation costs, $45,000 to Ditchfield for property damage, $1.2 million to Action Marine for lost business value, and $100,000 to Tharpe for emotional distress. The jury also awarded respondents $1,294,000 in attorneys' fees and $17.5 million in punitive damages. The district court ordered extensive injunctive relief (with an estimated cost to petitioners of $4.2 million). See Pet. 6.

2. The district court denied petitioners' post-trial motion, including their request that the $17.5 million punishment be vacated or substantially remitted because it was excessive when judged under the *BMW* factors. Pet. App. 33a, 41a-47a. With respect to the third *BMW* guidepost – "the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases" (*id.* at 42a) – the district court acknowledged its crucial importance in ensuring that a defendant receive fair notice. "'Whether a defendant had constitutionally adequate notice that his conduct might result in a particular damages award,'" the court explained, "'depends *in large part* upon the available civil and criminal penalties the state provides for such conduct.'" *Id.* at 46a (quoting *Johansen* v. *Combustion Eng'g, Inc.*, 170 F.3d 1320, 1337 (11th Cir.), cert. denied, 528 U.S. 931 (1999)) (emphasis added). At the same time, the district court noted that under Eleventh Circuit precedent the comparable-penalties factor "is accorded less weight" than the first two *BMW* factors. *Id.* at 30a (internal quotation marks omitted).

Next, the district court held that the relevant point of comparison was "the civil penalties that could have been imposed by the Alabama Department of Environmental Management ('ADEM')," the agency with responsibility over the Phenix City plant, "for air pollution pursuant to Alabama Code §§ 22-22A-4 and 22A-5." Pet. App. 46a. Those provisions authorize ADEM to impose a civil penalty that "shall not be less than $100.00 or exceed $25,000" for any violation of certain provisions of the Alabama environmental statutes or of "any rule, regulation or standard promulgated by the department, any provision of any order, or any condition of any permit, license, certification or variance issued by the department." Ala. Code §§ 22-22A-5(18)a, 22-22A-5(18)c.[2] "[T]hose statutes," the

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[2] The statute requires ADEM to consider the following factors in selecting the penalty for each violation from within the $100-$25,000 range: "the seriousness of the violation, including any irreparable harm to the environment and any threat to the health and safety of the public;

court explained, also "impose a $250,000 cap on the 'total penalty [that is] assessed in an order issued by the department.' Ala. Code § 22A-5(18)c." Pet. App. 46a.

Rather than evaluate how many violations petitioners had committed, how severe those violations were, and what civil penalties ADEM realistically would have imposed for the violations given the considerations ADEM must evaluate in setting penalties (see note 2, *supra*), the district court simply *assumed* that ADEM would have found at least ten violations and issued an order imposing the maximum of $250,000 in civil penalties. In making that assumption over petitioners' objections, the district court declined to give any weight to ADEM's *actual practice* of imposing civil penalties – which had resulted in no penalties in this case. See Pet. App. 46a & n.7.

Having made this assumption, the district court proceeded to rely primarily on *Johansen*, a pre-*State Farm* case, in which the Eleventh Circuit had upheld a punitive damages award that was $4.25 million higher than the $10,000 civil penalty that the State actually had imposed. Pet. App. 45a n.6, 46a. Focusing on the ratio of the $17.5 million punitive damages award to the maximum available penalty of $250,000 (70:1), the district court deemed it significant that *Johansen* had upheld a punitive damages award that was "400 times greater than the fine the mining company had received." Pet. App. 47a. "In light of this precedent," the court reasoned, petitioners received "adequate notice that their conduct could result in a substantial penalty for pollution." *Ibid.* Thus, although the punitive damages award in this case *exceeded* the $250,000 statutory cap *by $17.25 million*, the district court concluded that petitioners had adequate notice that they might receive the vastly larger punishment.

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the standard of care manifested by such person; the economic benefit which delayed compliance may confer upon such person; the nature, extent and degree of success of such person's efforts to minimize or mitigate the effects of such violation upon the environment; such person's history of previous violations; and the ability of such person to pay such penalty." Ala. Code § 22-22A-5(18)c.

3. The Eleventh Circuit affirmed but relied on a somewhat different analysis. Like the district court, it "assumed from the parties' arguments that Alabama law" – and Ala. Code § 22A-5(18)c in particular – was "the appropriate guide" in determining whether petitioners had received adequate notice that they "could be ordered to pay" a $17.5 million penalty. Pet. App. 30a. But the court of appeals disagreed that the $250,000 cap placed an upper limit on the potential civil penalty:

> While it is true that the relevant provision * * * limits "the total penalty assessed in *an* order issued" (emphasis added) by the regulating agency, the statute does not limit the *number* of such orders the agency may issue. In other words, ADEM is empowered to assess a penalty of up to $25,000 per violation up to a total of $250,000 per order. That does not mean that after issuing such an order, [the agency] cannot again assess penalties against a polluter who was the subject of a $250,000 fine.

Ibid. (emphasis altered; citations omitted). "Conceivably, then," the Eleventh Circuit reasoned, "Alabama could fine" petitioners "$250,000 for every ten violations." *Id.* at 31a.

Having concluded that a fine above the $250,000 cap was "conceivabl[e]," the Eleventh Circuit was quick to add that "we cannot simply presume that Alabama would have fined [petitioners] an incalculable number of times or would have assessed the maximum amount each time." Pet. App. 31a. "Nor are we capable of guessing," the panel explained, "as to the frequency of [petitioners'] violations, though evidence in the records indicates that it did indeed violate conditions of its permit and thus the [Alabama statute]." *Ibid.*

Despite these disclaimers, the Eleventh Circuit concluded that, "[c]onsidering the reprehensibility of [CCC's] conduct," it was possible to "*surmise* that *if* Alabama citizens had found themselves the victims of [CCC's] malfeasance, ADEM would have vigorously enforced the relevant statutes and fined [CCC] *closer to the maximum amount, perhaps* several times *if necessary*." Pet. App. 31a (emphasis added). Thus, the court of

appeals concluded, petitioner CCC was "on notice that its actions *could result* in civil penalties that far exceed the per-order cap limiting ADEM's discretion, and *we do not believe it implausible* that vigorous enforcement would have led to an accrual of fines totaling *several million dollars*." *Ibid.* (emphasis added). On the strength of that analysis – which apparently envisioned at least eight separate ADEM orders, each imposing the maximum $250,000 penalty (each of which, in turned, was based on ADEM's imposition of the maximum $25,000 penalty for ten violations) – the Eleventh Circuit concluded that petitioners received adequate notice that they might receive a punishment of $17.5 million because that figure "was not *grossly disproportionate* to the [civil] penalties [CCC] faced for its actions." *Id.* at 32a (emphasis added). Like the district court, the Eleventh Circuit made no effort to test the plausibility of its chain of assumptions by examining ADEM's actual track record of imposing civil penalties on petitioners or anyone else for violations of the State's environmental laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Due Process Clause of the Fourteenth Amendment embodies the "basic principle that a criminal statute must give fair warning of the conduct that it makes a crime." *Bouie* v. *City of Columbia*, 378 U.S. 347, 350-51 (1964). The requirement of fair warning protects the rights of individuals against arbitrary and unforeseeable actions by state actors (including lay juries); it also disciplines and checks government power by requiring precision in the definition of crimes before the government may bring to bear the full weight of its prosecutorial authority.

In *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996), this Court noted that, although "[t]he strict constitutional safeguards afforded to criminal defendants are not applicable to civil cases," the "basic protection against 'judgments without notice' afforded by the Due Process Clause * * * is implicated by civil *penalties*." *Id.* at 574 n.22 (emphasis in original). Moreover, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct

that will subject him to punishment, but also of the *severity of the penalty that a State may impose*." *Id.* at 574 (emphasis added). Applying these fundamental guarantees of fair notice, the Court invalidated as grossly excessive a $2 million punitive damages award that was "tantamount to a severe criminal penalty." *Id.* at 585. In so doing, the Court identified three "guideposts" – "the degree of reprehensibility" of the defendant's conduct; the ratio of the amount of punitive damages imposed to the "harm or potential harm suffered by" the plaintiff; and the difference between the punitive damages awarded and "the civil remedies authorized or imposed in comparable cases" – "each of which indicate[d] that BMW did not receive adequate notice of the magnitude of the sanction that Alabama might impose." *Id.* at 574-75.

The third *BMW* guidepost, "the civil remedies authorized or imposed in comparable cases," 517 U.S. at 575, is particularly important in assuring that defendants receive fair notice of the magnitude of possible punishment. Beyond its crucial role in ensuring notice, this guidepost ensures that judicial determinations concerning excessiveness are firmly rooted in the soil of legislative or administrative judgments. Precisely because legislatures are in a better position to determine the need for punishment and deterrence, *BMW* instructed that courts must give "substantial deference" to the "legislative judgments concerning appropriate sanctions for the conduct at issue." *Id.* at 583. And where, as here, the relevant civil penalties are embedded in a complex regulatory scheme that is administered by an expert state agency delegated the authority to do so by the legislature, these concerns are heightened. The actual enforcement activities of specialized regulators under such a scheme are a far better measure of the need for deterrence and punishment than is the ad hoc decision of a lay jury.

1. Under this Court's cases, the proper focus of the third *BMW* factor is on the *absolute difference* between (a) the punitive damages award and (b) the legislative and/or administrative civil penalties that might *realistically be imposed* for the defendant's conduct vis-à-vis the plaintiffs. In *BMW*

itself, the Court not only pointed out that the $2 million punitive award was "substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance," but it also emphasized that there was no evidence that such a large punishment had ever been meted out in the real world. See 517 U.S. at 584 (noting absence of "any judicial decision in Alabama or elsewhere indicating that the application of [BMW's] policy might give rise to such severe punishment").

Similarly, in *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 442 (2001), the Court made clear in ordering a remand that a reviewing court should avoid "unrealistic" assumptions in applying the *BMW* factors to assess excessiveness. The Court refused to credit the plaintiff's argument that the defendant would have received the maximum penalty for each of the thousands of offending pieces of promotional materials that it sent out, explaining that it was more realistic to think that this conduct would have been treated as a single violation. *Id.* at 442-443. And in *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003), the Court again cautioned against relying on "remote possibilit[ies]" and "speculat[ion]" in evaluating the comparable-penalties factor. *Id.* at 428. Although the Court framed the second *BMW* factor as a ratio, it reiterated that the critical issue under the third *BMW* factor was the absolute "*disparity* between the punitive damages award" and the comparable civil penalties that might realistically be imposed. *Ibid.* (emphasis added).

This Court's realistic approach to the comparable-penalties factor makes eminent sense. It effectuates both the notice and the comparable institutional competence concerns that underlie this important barometer of excessiveness. Although the theoretical availability of a *range* of civil penalties for the relevant conduct provides a defendant with notice that he may receive punishment within the range prescribed by the legislature, it does not answer the question of where within that range the defendant's civil penalty would likely fall. To answer that question, a reviewing court must consider the severity of the defendant's conduct and the civil penalties such conduct would

likely receive. Where, as in this case, the civil penalty provision is administered by an expert agency of state government – the Alabama Department of Environmental Management (ADEM) – there is all the more reason to consider the regulator's actual practice in imposing civil penalties on the defendant and others. Not surprisingly, many lower federal and state appellate courts have heeded this Court's teachings by applying the comparable-penalties guidepost with a healthy dose of realism.

In the decision below, the Eleventh Circuit departed from this Court's teachings. Not only did it effectively ignore the $250,000 cap on civil penalties under Ala. Code § 22-22A-5(18)c, but it relied on a series of speculative and unfounded assumptions about ADEM's likely punishment actions as well as petitioners' likely recalcitrance in the face of agency oversight. Thus, the Eleventh Circuit assumed that ADEM would determine that petitioners had *committed ten separate violations* of the permit (or of some other, unspecified law or regulation) and would impose the *maximum* penalty of $25,000 for each such violation; assumed that petitioners would be recalcitrant in the face of this large punishment and would continue to violate the permit or Alabama law in multiple ways; and assumed that ADEM would go through the same exercise of finding ten violations, imposing $25,000 fines for each violation, and levying a total punishment of $250,000 – *at least seven more times*. See Pet. App. 31a ("we do not believe it implausible that vigorous enforcement would have led to an accrual of fines totaling several million dollars").

Notably, the court of appeals failed to test *any* of these assumptions against the available evidence of ADEM's *actual practice of imposing civil penalties* against petitioners or others – evidence that shows that the $17.5 million punitive damages award was grotesquely excessive. See pp. 15-16, *infra*. Relying on nothing more than a chain of speculative assumptions, the Eleventh Circuit brushed aside the massive "disparity between the punitive damages award" (*State Farm*, 538 U.S. at 428) and the $250,000 maximum civil penalty (or even the "several million dollars" imagined by the court of appeals, see Pet. App.

31a). And it did so even though that disparity – of *$17.25 (or $15.5) million* – is vastly larger than the disparity this Court held in *BMW* was sufficient to deprive a defendant of fair notice that the larger punishment was a realistic possibility.

II. Further review is also warranted because the Eleventh Circuit's decision exacerbates conflict and confusion in the lower federal and state appellate courts over the meaning of the third *BMW* guidepost. Like the Eleventh Circuit in this case, some circuits and state appellate courts have continued, even after *State Farm*, to rely on speculation about severe, but highly unlikely, legislative penalties in applying this important indicium of excessiveness, whereas other courts have taken the teachings of *BMW*, *Cooper* and *State Farm* to heart. The issue is both important and recurring; it arises in potentially every case where the size of a punitive damages award is challenged under the Due Process Clause. And this case is an excellent vehicle for at least two reasons. First, it is representative of a significant and growing category of punitive damages cases involving environmental torts. Second, the Eleventh Circuit's reliance on a chain of utterly speculative assumptions stands in sharp contrast to this Court's teachings and the available evidence of what a comparable penalty realistically would have been under ADEM's enforcement practices.

ARGUMENT

This case presents a valuable opportunity not only to rectify a glaring example of punitive damages "run wild" (*Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 (1991)), but also to ensure that the *BMW* factors will function as intended: as meaningful guidance for appellate review of punitive damages and as a safeguard to ensure that defendants who are punished through the imposition of exemplary damages receive the fair notice required by the Due Process Clause. As petitioners persuasively demonstrate, the Eleventh Circuit's interpretation of all three *BMW* factors is squarely at odds with this Court's decisions and contrary to the decisions of many lower federal and state appellate courts. Accordingly, and for all the reasons set forth in the petition, further review is clearly warranted.

For reasons of space, *amici* focus in this brief on the Eleventh Circuit's flawed understanding of the third *BMW* guidepost – "the civil remedies authorized or imposed in comparable cases" (517 U.S. at 574). That guidepost is especially important in assuring defendants constitutionally adequate notice of the magnitude of possible punishment.

I. The Eleventh Circuit's Decision Conflicts With This Court's Decisions Concerning The Meaning Of The Third *BMW* Factor

In at least two critical respects, the Eleventh Circuit's decision strays from this Court's teachings concerning the meaning of the comparable-penalties guidepost. Under this Court's decisions, the proper focus of the third *BMW* factor is on the *absolute difference* between (a) the punitive damages award, and (b) the legislative and/or administrative civil penalties that might *realistically be imposed* for the defendant's conduct vis-à-vis the plaintiffs. In the decision below, the Eleventh Circuit made no attempt to evaluate the realistic odds of a $17.5 million civil penalty by the Alabama environmental agency, and instead relied on a series of wholly speculative assumptions that were designed to render meaningless the $250,000 statutory cap on civil penalties. Second, the Eleventh Circuit ignored the fact that – even under its wholly speculative assumptions about the civil penalties faced by petitioners – the $17.5 million punishment meted out by the jury was *at least $15.5 million higher* than the imagined civil penalty (and $17.25 million higher than the statutory cap). That disparity is far greater than the less-than-$2 million disparity this Court held in *BMW* was sufficient to deprive the defendant of adequate notice.

a. In *BMW*, this Court noted that "the $2 million" exaction imposed by the jury was "substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance" (which ranged from a maximum fine of $2,000 to $10,000). 517 U.S. at 584. "*None* of these statutes," the Court explained, "would provide an out-of-state distributor with fair notice that the first violation – *or indeed the first 14 violations* * * * – might subject an offender to a multimillion

dollar penalty." *Ibid.* (emphasis added). Thus, the Court was of the view that the availability of even a civil penalty of $140,000 would not provide constitutionally adequate notice of the possibility of a punitive damages award $1,860,000 higher. And in reaching that result, the Court emphasized the absence of any evidence that such a large punishment had ever been meted out in the real world. See *id.* at 584 (noting absence of "any judicial decision in Alabama or elsewhere indicating that the application of [BMW's] policy might give rise to such severe punishment").

In *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court made clear in ordering a remand that a reviewing court should avoid "unrealistic" assumptions in applying the *BMW* factors to assess excessiveness. *Id.* at 442. In discussing the comparable-penalties guidepost, the Court refused to credit the plaintiff's argument that the defendant would have received the maximum penalty for each of the thousands of offending pieces of promotional materials that it sent out, explaining that it was more realistic to think that this conduct would have been treated as a single violation. *Id.* at 442-43. On remand, the Ninth Circuit understood this Court to have instructed it to look not at what penalties theoretically *might* have been imposed on the defendant, but at whether "Cooper's conduct *likely would* * * * have been subject to civil penalties in any amount approaching the punitive damages awarded by the jury," which the court concluded it would not. *Leatherman Tool Group, Inc.* v. *Cooper Indus., Inc.*, 285 F.3d 1146, 1148 (9th Cir. 2002) (emphasis added). The Ninth Circuit on remand accordingly cut the punitive award by almost 90%, from $4.5 million to $500,000.

Finally, in *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003), the Court reiterated that the critical issue under the third *BMW* factor was "the *disparity* between" the punitive damages award and the comparable civil penalties. *Id.* at 428 (emphasis added). In addition, the Court again cautioned against relying on "remote possibilit[ies]" and "speculat[ion]" in evaluating the comparable-penalties factor. *Ibid.* It noted that while the Court had previously "looked to criminal penalties" in

conducting this analysis, the mere existence of a criminal penalty "has less utility" when "used to determine the dollar amount of the award" because "[p]unitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award." *Ibid.* Moreover, this Court criticized the Utah Supreme Court for having "speculated about the loss of State Farm's business license, the disgorgement of profits, and possible imprisonment" when, in fact, the "most relevant civil sanction under Utah state law for the wrong done to the Campbells appears to be a $10,000 fine for an act of fraud." *Ibid.* Because a fine in that amount was "dwarfed" by the $145 million punitive award, the Court reasoned, the third *BMW* factor further showed that the award was constitutionally excessive. *Ibid.*

b. This Court's approach to the third *BMW* factor makes eminent sense. In a world in which severe statutory penalties are often *theoretically* available for conduct that is widespread and generally not punished at all, see *Bowers* v. *Hardwick*, 478 U.S. 186, 197 (1986) (Powell, J., concurring), surely attention to realistically likely penalties is the only approach that will provide meaningful constitutional protection against grossly excessive penalties. Cf. *Lankford* v. *Idaho*, 500 U.S. 110 (1991) (although death penalty was *theoretically* available against defendant at all times, course of proceedings led him reasonably to believe that it was not a realistic possibility, and due process was violated when death sentence was imposed without adequate chance to argue against it) (cited in *BMW*, 517 U.S. at 574 n.22). Moreover, where, as here, the most comparable civil penalties are entrusted by the legislature to enforcement by an expert administrative agency, it would be strange indeed to ignore the agency's actual behavior in evaluating what civil penalties realistically were likely to be imposed. The agency's actual enforcement activities are the most reliable basis for a defendant's notice of the penalty that could be expected.

c. Contrary to this Court's decisions, the Eleventh Circuit failed to examine the civil penalties that might *realistically* be imposed on petitioners by ADEM and gave no indication that it

was properly focusing on the *$15.5-17.25 million disparity* between the massive exaction imposed by the jury and the civil penalties the court of appeals believed were likely to be imposed by ADEM. To be sure, the Eleventh Circuit did acknowledge that, under Alabama law, "[a]ny civil penalty assessed or recovered * * * shall not be less than $100 or exceed $25,000 for each violation, provided however, that the total penalty assessed in each order issued by the department * * * shall not exceed $250,000.00." Ala. Code § 22-22A-5(18)c. See Pet. App. 30a. But the court of appeals rendered the $250,000 cap meaningless by resorting to a series of unwarranted assumptions grounded in nothing more than speculation. First, it posited that ADEM might have issued an order imposing the maximum penalty of $25,000 for each of ten separate violations, thus fining petitioners the statutory maximum of $250,000. Next, it supposed that ADEM might have issued multiple orders, each of which imposed the $250,000 maximum for another ten violations. Pet. App. 31a ("Conceivably, * * * Alabama could fine [petitioners] $250,000 for every ten violations."). Finally, the Eleventh Circuit arrived at the conclusion that it was not "implausible that vigorous enforcement" by ADEM "would have led to an accrual of fines totalling *several million dollars*." *Ibid.* (emphasis added). Thus, the court of appeals evidently envisioned that ADEM would issue at least *eight separate orders*, each imposing the maximum penalty of $250,000 on petitioners – and do so based on a sum total of at least 80 separate violations, each of which would be punished by the maximum fine of $25,000.

As the Eleventh Circuit came close to admitting, the assumptions underlying this imaginary scenario are entirely speculative. "[W]e cannot simply presume," the court of appeals correctly observed, "that Alabama would have fined Continental an incalculable number of times or would have assessed the maximum amount each time." Pet. App. 31a. "Nor are we capable," the court added, "of guessing as to the frequency of Continental's violations * * *." *Ibid.* Despite those disclaimers, the Eleventh Circuit evaluated the comparable statutory penalties

faced by petitioners under Ala. Code § 22-22A-5 based on the assumption that petitioners would commit at least 80 separate violations, would receive the maximum penalty of $25,000 for each of those violations, and would be subjected by ADEM to at least eight separate orders notwithstanding the $250,000 cap placed by the legislature on a single order.

The only basis for this series of wild assumptions, apart from the Eleventh Circuit's unfounded view that petitioners' conduct was highly reprehensible, was the court of appeals' statement that there was "evidence in the record" that petitioners had on one occasion "violate[d] conditions of its permit." Pet. App. 31a. The court of appeals made no effort to justify the leap from evidence of one violation to an assumption of at least 80 separate violations – indeed, it conceded that it was not incapable of making that leap without "guessing." *Ibid.* Nor did the Eleventh Circuit, in its analysis of the comparable penalties factor, attempt to justify its apparent assumption that it would take at least eight separate orders, each imposing penalties of $250,000, before petitioners would cease their supposed but unspecified violations of the permit or of Alabama law. As petitioners demonstrate (Pet. 13-14 n.4), the image of intransigence or truculence painted by the Eleventh Circuit in other portions of its opinion lacks support in the record.

As if that were not enough, the Eleventh Circuit's assumptions are easily refuted by examining ADEM's *actual practice* of imposing civil penalties. For starters, it is undisputed that ADEM imposed *no* civil penalties on petitioners for the conduct underlying this litigation. Beyond that, ADEM's actual practice of imposing civil penalties generally – as reported in official publications that are available on the agency's website and subject to judicial notice – would have provided no warning that a $17.5 million punishment was realistically possible. See, *e.g.*, ALABAMA DEPARTMENT OF ENVIRONMENTAL MANAGEMENT, ENVIRONMENTAL SUMMARY 2001 ("2001 Annual Report") <available at http://www.adem.state.al.us/Publications/EnvSummary/EnvSum.htm>. Those materials show, for example, that in all of Fiscal Year 2001, ADEM

imposed a total of *only $389,210* in civil penalties for *all* violations relating to air pollution statewide. *Id.* at 25. Moreover, in 2001, ADEM imposed total penalties for all types of pollution (land, water, and air) of only $2,054,260 (versus $1.85 million in 2000 and $1.2 million in 1999). *Ibid.* This level of penalty assessment hardly gave petitioners fair warning that they would receive a punishment of *$17.5 million*. Indeed, the jury's $17.5 million exaction was $4.5 million higher than the total of *all* civil penalties imposed by ADEM in the eight years spanning 1998-2006. See note 3, *infra*.

Equally at odds with actual experience is the Eleventh Circuit's assumption that ADEM was likely to issue *at least eight separate orders, each* imposing the maximum exaction of $250,000. The agency's own data show that, in 2001, ADEM issued a total of 225 administrative orders, 208 of which imposed monetary penalties – for an average civil penalty of only $9,876.50. *Ibid.*[3] Moreover, of those 208 penalties imposed in 2001, the most that could have reached the maximum level was eight (which would require the assumption that the remaining 200 penalties totaled $54,260). Even assuming that there *were* eight such orders (and it may be that there were none), that would still represent *only 4%* of the agency's total orders imposing civil penalties. In light of this data, the notion that ADEM would have imposed *at least eight consecutive orders*, each imposing a $250,000 civil penalty, is fanciful.

Nor is there any basis in the record or common sense for the Eleventh Circuit's unstated assumption that petitioners would

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[3] The data from other fiscal years are similar. For example, the average penalty imposed by ADEM in FY 2000 was $8,919.50. 2000 Annual Report, at 29 (227 administrative orders, 208 of which impose monetary penalties, with total penalties of $1,855,255). Notably, the total amount of civil penalties imposed by ADEM in the entire eight years spanning FY1999 to FY2006 was only approximately $13 million – still far below the punitive award in this case. See 2006 Annual Report, at 22 ($1.22 million); 2005 Annual Report, at 21 ($1.38 million); 2004 Annual Report, at 5 ($1.16 million); 2003 Annual Report, at 4 ($1.71 million); 2002 Annual Report, at 25 ($2.44 million); 2001 Annual Report, at 25.

have continued to engage in violations and to incur successive $250,000 penalties after receiving the maximum punishment from ADEM. Not only does that assumption ignore the duties owed by petitioners to their shareholders (and the controversy such a course of conduct would have created), but it is also refuted by the record evidence showing that petitioners took various steps to identify and remedy the causes of the carbon black emissions. Pet. 3-4, 13-14 n.4.

The Eleventh Circuit's reliance on speculative assumptions and improbable scenarios is squarely at odds with this Court's decisions in *BMW*, *Cooper* and *State Farm*. Indeed, it is reminiscent of the approach of the Utah Supreme Court that was rejected in *State Farm*. In that case, the Utah Supreme Court had concluded that the third *BMW* factor did not require a reduction of the jury's $145 million punishment because State Farm supposedly could have been required under Utah law to (1) "pay a $10,000 fine for each act of fraud" in the sprawling nationwide "scheme" alleged by plaintiffs; (2) "renounce its business license or have its Utah operations dissolved"; and (3) "disgorge all the illicit profits gained by the scheme, plus pay a fine of twice the value of those profits." 65 P.3d 1134, 1154-55 (Utah 2001). In addition, "State Farm's officers could be imprisoned or removed from office for up to five years." *Id.* at 1155. In reversing, this Court made clear that the lower court was wrong to consider all manner of hypothetical penalties of the Chicken-Little variety, including revocation of State Farm's license to do business and potential criminal penalties. Instead, it should have avoided these "speculat[ions]" and focused solely on the statutory penalty for the fraud concerning the Campbells. 538 U.S. at 428. The Eleventh Circuit in this case made exactly the same mistake.

II. The Eleventh Circuit's Decision Exacerbates Conflicts And Confusion In The Lower Courts Over The Proper Interpretation Of The Third *BMW* Factor

As petitioners persuasively demonstrate (Pet. 18-22), there is widespread confusion in the lower courts over the proper interpretation of the comparable-penalties guidepost. Like the Eleventh Circuit in this case, some circuits have continued, even

after *State Farm*, to rely on speculation about severe, but highly unlikely, legislative penalties, whereas others have taken the teachings of *BMW*, *Cooper* and *State Farm* to heart. Compare *Mathias* v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) (Posner, J.) (in upholding $186,000 punitive award based on conduct that was punishable by a fine of $2,500, relying on fact that defendant was also "subject to revocation of its license" to do business, and noting that "[w]e are sure that the defendant would prefer to pay the punitive damages assessed in this case than to lose its license") and *Union Pac. R.R.* v. *Barber*, 149 S.W.3d 325, 349-50 (Ark.) (examining "total civil penalties authorized by law" under both state and federal provisions and assuming that penalties would be imposed for each of 450 consecutive days), cert. denied, 543 U.S. 940 (2004) with *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 608 (6th Cir. 2006) (relying on maximum civil penalties fixed by statute and refusing to rely on possibility that defendant "could potentially be subjected to a larger civil penalty if * * * its corporate license was suspended or revoked" because there was no evidence presented that the latter scenario was likely). See also Pet. 19-20 (citing and discussing additional cases).[4]

In light of these disagreements, it should come as no surprise that some courts have expressed either consternation, or a desire for greater guidance from this Court, or both. Illustrative is the Third Circuit's decision in *Willow Inn, Inc.* v. *Pub. Serv. Mut.*

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[4] Further demonstrating the need for guidance, the district court took a different approach to the comparable-penalties inquiry than did the court of appeals, even though both reached the same result. See pp. 3-6, *supra*. The district court did not adopt the speculative assumptions of the Eleventh Circuit concerning the supposed possibility of multiple ADEM orders, each imposing the $250,000 maximum penalty. Instead, it treated the $250,000 as a true ceiling, but then relied on *Johansen* for the questionable proposition that even a large *multiple* of that figure would be expected by a defendant. As explained above, however, it is the *absolute difference* between the punitive award and the likely civil penalty (not their ratio, which is the basis for the second *BMW* factor) that is most important under the comparable-penalties guidepost.

Ins. Co., 399 F.3d 224 (2005), where the court of appeals noted that "the Supreme Court has not declared how courts are to measure civil penalties against punitive damages, and many courts have noted the difficulty in doing so." *Id.* at 237. "We are similarly unsure," the Third Circuit added, " as to how to properly apply this guidepost, and we are reluctant to overturn the punitive damages award on this basis alone." *Id.* at 238.

The pervasive confusion in the lower courts has not gone unnoticed by commentators. See, *e.g.*, Jenny Jiang, Comment, *Whimsical Punishment: The Vice of Federal Intervention, Constitutionalization, and Substantive Due Process in Punitive Damages Law*, 94 CAL. L. REV. 793, 807-12 (2006) (describing divergent approaches to the comparable-penalties guidepost that have developed in lower courts since *State Farm* and arguing that these divisions "have substantially undercut" this Court's "effort to bring uniformity and coherence to * * * punitive damages law"); Steven Chanenson & John Yotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze From the* BMW/State Farm *Guideposts*, 37 U. MICH. J.L. REFORM 441, 443 (2004) ("The third guidepost remains shrouded in fog."); *id.* at 472 ("both state and federal courts have grappled with applying the third guidepost with little uniform success").

Perhaps most troubling of all, some courts have simply ignored the third *BMW* factor altogether or treated it as a trivial component of the excessiveness inquiry. One recent example is *In re Exxon Valdez*, 490 F.3d 1066 (9th Cir. 2007), pet. for cert. filed, 76 U.S.L.W. 3073 (U.S. Aug. 20, 2007) (No. 07-219), where the Ninth Circuit noted that its most recent cases had "generally not attempted to quantify legislative penalties" but had instead merely considered "whether or not the misconduct was treated seriously under state civil and criminal laws." *Id.* at 1094. Moreover, in some recent cases the Ninth Circuit had "not discussed the factor at all." *Ibid.* (citing cases). Having determined that Exxon's misconduct "was taken quite seriously by legislatures," the Ninth Circuit concluded that the comparable-penalties guidepost supported a punishment of $2.5 billion. *Id.* at 1094-95. See also Chanenson & Yotanda, *supra*,

37 U. MICH. J.L. REFORM at 471 ("[A] number of lower courts have simply stated that an award of punitive damages does not run afoul of the third guidepost if there exists a state law that gives the defendant notice that the conduct at issue may give rise to some form of criminal or civil liability."); Pet. 22 (citing additional cases).

Review should be granted to dispel the pervasive confusion and bring greater uniformity to this important area of federal law. As the large number of cases cited by the petitioner and by commentators suggests, the issue is recurring; indeed, it arises in almost every case where a due process challenge is mounted to the excessiveness of a punitive damages verdict. Finally, for several reasons this case is an especially good vehicle for clarifying the comparable-penalties guidepost. First, it is representative of a large and growing category of punitive damages cases involving environmental harms that have caused substantial difficulty for the lower courts.[5] Second, the Eleventh Circuit's reliance on a chain of utterly speculative assumptions stands in dramatic contrast to the available evidence of what civil penalties might realistically have been imposed by the expert administrative agency charged by the State with the responsibility for policing, punishing, and deterring environmental harms. To anyone familiar with the agency's *actual* practice of imposing civil penalties (including its failure to impose *any* penalties on petitioners), the jury's imposition of a massive $17.5 million punishment would have been as unexpected as a lightning bolt out of a clear blue sky.

CONCLUSION

The petition for a writ of certiorari should be granted.

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[5] See Andrew Moskowitz, Comment, *Meaning Is In The Eye of The Beholder:* BMW *v.* Gore *and Its Potential Impact on Toxic Tort Actions Brought Under State Common Law*, 8 FORDHAM ENVT'L L.J. 221, 223-24 (1996) (describing the "increasing importance of common-law tort actions in environmental law" and attributing this development, among other things, to the fact that many state and federal environmental statutes "do not provide for * * * punitive damages").

Respectfully submitted.

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